



# DUTY TO ACCOMMODATE:

A PSAC guide for  
Local Representatives



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# DUTY TO ACCOMMODATE: A GUIDE FOR LOCAL REPRESENTATIVES

The Public Service Alliance of Canada (PSAC) is committed to ensuring that workplaces are equitable and fair. As our communities and workplaces continue to become more diverse, human rights remain essential in providing inclusive representation to our membership.

In order to address diversity and inclusion, we must remove the barriers that prevent historically-excluded and disadvantaged groups from fully participating in their workplaces and communities. The duty to accommodate is an important human rights principle in Canada that can be used to address these issues. As a result of a 1999 Supreme Court of Canada decision - known as “*Meiorin*” - this concept was radically changed in a very positive way.

The *Meiorin* decision broadened the definition of the duty to accommodate by putting a positive obligation on employers to design workplace standards and requirements so that they do not discriminate. In other words, the employer must take proactive action to ensure these standards and requirements are not discriminatory. The decision states:

*Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. **They must build conceptions of equality into workplace standards.** By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work **should be designed** to reflect all members of society, in so far as this is reasonably possible. The standard itself is required to provide for individual accommodation, if reasonably possible.*

The duty to accommodate is usually thought of in relation to disability, but it also relates to all grounds of discrimination found under human rights legislation including national or ethnic origin, religion, sexual orientation, gender identity and expression, family status and so on.<sup>1</sup>

This Guide is set up as a question and answer document. If you have questions that are not answered in this document, contact your [Local](#) or [Component](#) for further information. Questions you feel should be addressed in the Guide should be forwarded to the PSAC Human Rights Office by contacting us at 1 888 604 7722 or [psacunion.ca/contact-us](http://psacunion.ca/contact-us).

This publication is available online and in print in a variety of formats. If you require an alternate format, please visit [psacunion.ca](http://psacunion.ca) or contact the PSAC Human Rights Office at 1 888 604 7722 or [psacunion.ca/contact-us](http://psacunion.ca/contact-us).

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<sup>1</sup> While this Guide addresses accommodation in the workplace, it should be noted that our union also has a requirement to ensure that there are no artificial barriers that prevent our members from fully participating in union activity.

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## Q-1 What is the duty to accommodate?

The duty to accommodate is the duty of employers to make sure that their workplaces are inclusive and allow all workers to participate fully. This duty relates to the grounds of discrimination in human rights laws.

What does this mean?

- The employer must design policies, procedures, requirements, standards and practices so that they do not create barriers to employees' participation based on human rights grounds.
- The employer must adapt the workplace (physical work space or equipment, or workplace rules, practices etc) to ensure that individual workers can fully participate.

Examples:

- designing physical spaces with accessibility in mind for people with different physical abilities and limitations
- ensuring policies on absences from work are inclusive and flexible enough to adapt to different family obligations or religious requirements
- providing an adapted workstation if a worker has disability-related ergonomic needs
- allowing a gradual return to work that involves flexible hours for a specified period of time after an employee's long-term medical absence

## Q-2 Who has the right to be accommodated?

The duty to accommodate is usually thought of in terms of disability, but it relates to a broad range of individual differences among workers. Any needs that are related to the grounds of discrimination under human rights laws are covered by the duty to accommodate.

The following prohibited grounds of discrimination exist in most human rights laws\* in Canada:

- Race or colour;
- Age;
- National or ethnic origin;
- Sex;
- Religion or creed;
- Sexual orientation;
- Gender identity and/or gender expression (either specifically covered or indirectly covered under another ground);
- Marital status;
- Family status;
- Disability (visible and non-visible disabilities including physical, cognitive, psychological, sensory and learning, episodic and substance use disorders);

- Genetic characteristics and;
- A conviction for which a pardon has been granted or a record suspended.

\*NOTE: The grounds of discrimination vary among federal, provincial and territorial human rights laws, therefore check the legislation that applies to your workplace.

In addition, under the *Employment Equity Act*, employers under federal jurisdiction are also required to be proactive in identifying and eliminating employment barriers against persons in four designated groups: women, racialized people, people with disabilities and Indigenous Peoples. For more information, see PSAC [Employment Equity](#).

### **Q-3 Is the employer the only one who has a duty to accommodate workers in the workplace?**

The duty to accommodate largely rests on the employer because it has ultimate control over the workplace and sets the policies, practices, standards, etc.

In individual cases of accommodation, the employer must investigate all possible accommodations and consult the union and employee.

#### **The duty of the union**

While the employer has the primary duty to accommodate workers, the union also has a positive duty to accommodate and must not block or prevent the accommodation of a worker.

“Non-discrimination” or “duty to accommodate” clauses are found in most collective agreements. As a result, a worker’s right to be accommodated is a collective agreement right. The actions of a union are also covered by human rights legislation.

Where a union has negotiated an arrangement or a collective agreement provision that has a discriminatory impact, it has a joint responsibility with the employer to proactively eliminate that discrimination. Even if the union was not involved in negotiating or implementing a discriminatory provision, it must cooperate with the efforts of the employer to accommodate workers.

If the employer does not take its responsibility seriously, the union should insist that the employer take the necessary action.

In most cases, the union should support accommodation measures because collective agreement provisions can and should be interpreted and applied in a way that avoids a discriminatory impact. However, the union does not have to support an employer’s accommodation measures if it can demonstrate that there is a **substantial** interference of collective agreement rights to the point of undue hardship.



### The duty of the worker

Workers have an obligation to cooperate and assist in the accommodation process, including providing information (e.g. medical documentation) that will help determine what accommodation is required and, if possible, identifying appropriate accommodation. The worker must accept “reasonable” accommodation, even if it is not ideally what the worker wanted. If the worker refuses to accept a proposed accommodation, then they must provide a reasonable explanation for the refusal.

However, while an employee must cooperate, they are not required to accept a proposed accommodation that is unreasonable (i.e. an accommodation proposal that threatens the employee’s general health or well-being).

### Q-4 What is the legal right to accommodation?

The right to accommodation comes from various laws that apply to the workplace.

#### Human rights acts and codes

PSAC members who work in the federal jurisdiction (federal public service and separate agencies, crown corporations, transportation sector, etc.) fall under the *Canadian Human Rights Act*. This legislation includes a specific requirement of employers to accommodate individual workers up to the point of undue hardship (section 15(2)).

With the precedent-setting *Meiorin* Supreme Court of Canada decision in 1999, the duty is broadened to include the employer’s obligation to proactively eliminate discrimination in its policies and practices.

Provincial and territorial human rights acts or codes vary in their accommodation provisions. However, the *Meiorin* decision applies to all human rights legislation in Canada.

#### Other laws that provide accommodation rights

Other laws, such as provincial or territorial workers’ compensation acts, labour legislation, and the *federal Public Service Employment Act*, address the duty to accommodate employees with disabilities under certain circumstances.

However, these other laws may not go far enough to meet the duty to accommodate under human rights legislation or may be in conflict with it. In those cases, the last word is always the human rights legislation, because the Supreme Court of Canada has held that all human rights legislation is quasi-constitutional (i.e. nearly constitutional).

### Accessibility legislation

The *Accessible Canada Act* requires the federal government and federally-regulated industries to remove and prevent barriers to people with disabilities in a number of areas including built environments, employment, information and communication technologies, and service delivery, among others. This legislation applies to Parliament, federal government departments and agencies, crown corporations, the Canadian Forces and RCMP, and private businesses in federally-regulated sectors (telecommunications, interprovincial transportation, and banking). Organizations must develop accessibility plans to outline how they will become accessible, including making the workplace fully accessible and removing barriers to employment and participation at work.

So far, only three provinces have similar legislation that covers workers under provincial jurisdiction: Ontario, Manitoba, and Nova Scotia. British Columbia is also proposing an accessibility law. Other provinces and territories may follow suit in the years to come

### Collective agreements

Collective agreements must be interpreted and applied consistently with human rights legislation and case law. Courts have ruled that human rights laws are basically “read into” collective agreements. In other words, the provisions in human rights laws that relate to the workplace are considered part of the collective agreement.

### Other laws covering the workplace

The *Employment Equity Act*, which covers the federal sector and certain federal contractors, states that employment equity plans must include positive policies and practices for the accommodation of those belonging to the designated groups.

Federal public service workers are also covered by the *Public Service Employment Regulations (PSER)*. Section 7 of the Regulations sets out a time-limited priority for workers who develop disabilities in order to facilitate their reintegration and return to work. This is not limited to workplace injuries.

Other workers under federal jurisdiction are covered by the *Canada Labour Code*. The Code provides wage protection, workplace hazards, and return-to-work provisions for workers injured on the job.

As well, most provincial/territorial workers’ compensation acts include provisions on modified work, return to work and the worker’s re-employment rights.

There are different requirements that the employer must meet under these laws. It is important for a union representative to understand how these laws might apply in any individual case. Refer to

the specific legislation that covers your workplace, check with your provincial/territorial workers' compensation board, or speak with your component or PSAC regional office if you need assistance.

### Q-5 When does the duty to accommodate a worker arise?

As the *Meiorin* case set out, employers must design workplaces so that equality and accommodation are built in to all policies and practices.

In practical terms, the worker must advise the employer of any accommodations they need to return to work or participate fully at work. Note: the situation may be different if there is a mental health disability or substance use disorder involved. See Q11

Once a worker identifies a need for accommodation related to a prohibited ground (such as disability, religion, family status, gender identity, etc.) then the duty is on the employer to make every reasonable effort to accommodate the worker.

In other words, the worker must show that they have a disability, a religious practice or family responsibilities, etc. that requires accommodation. Without the accommodation, there are barriers for the worker who is unable to fully participate and/or to have access to benefits and opportunities that others have in the workplace. The employer must remove the barriers through accommodation of the worker.

### Q-6 What is a bona fide occupational requirement (BFOR)?

Most human rights legislation and case law refer to this term, which creates an exception to the employer's duty to accommodate. In other words, an employer must accommodate unless they can establish that the job requirement is a *bona fide occupational requirement* (BFOR).

A BFOR refers to the **essential tasks** required to perform a job. Where an employer can establish a particular BFOR, they can exclude certain workers, under certain circumstances, from a job.

The employer is obligated to accommodate to the point of undue hardship **before** a BFOR defence can be established.

BFORs are not preferences; they are essential to the job. For example, while an employer may prefer workers to have a high school diploma for certain jobs or require them to lift a certain weight by hand, it is not a BFOR unless the employer can demonstrate that the job cannot be done without that qualification. Preferences such as this may have the effect of screening out certain groups of applicants or forcing existing workers out of the workplace unnecessarily.

The *Meiorin* decision sets out three steps that help determine whether a discriminatory standard is a BFOR:

1. Did the employer adopt the standard for a purpose rationally connected to the performance of the job?
2. Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
3. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose? To show the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees without imposing undue hardship upon the employer.

In *Meiorin*, the Court suggested the following as important questions to be asked in relation to Step 3:

- Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could a standard reflective of group or individual differences and capabilities be established?
- Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

This analysis should be considered whenever an employee requests accommodation.

### **Q-7 How do we identify the essential elements or duties of a job?**

It is important in identifying BFORs to differentiate between tasks or skills that **appear** to be essential, or are employer preferences, as opposed to those that are essential. While it's not always possible for someone to perform certain tasks in non-traditional ways, it is important to clearly define what the actual task is so that the appropriate accommodation can be identified.

#### Examples

- 1) A job requires that a person is able to move plywood from one area of the storeroom to another. Traditionally, this may have been done by a worker picking up the plywood and manually moving it to the new location. While it may appear that the essential task is to be able to pick up and manually move the object, the actual essential task is to move it. A scissor lift or other device could be used to allow someone to perform the essential task in question.

- 2) In an office, the work might involve computer operation and the essential task might appear to be the ability to use a keyboard. In fact, the essential task is to operate the computer and voice recognition software would allow a worker without full use of their hands to complete this task.
- 3) Workers are required to work in an older building that does not have good air circulation and ventilation. There have been problems with mold. Most workers must work in cubicles. If a worker has an environmental-related disability and cannot work in that workplace, then there should be a review of the workplace site to determine if changes can be made so that the worker can continue to work at the worksite (i.e. new ventilation systems; closed cubicle; no-scent policy, scent-free products are used at the workplace, etc.). After exhausting the accommodations available at the worksite, alternative worksites may need to be considered.
- 4) At a workplace, workers may be required to work on a rotation of shifts every two weeks because the workplace operates 24 hours a day. For some workers with family responsibilities such as childcare, rotational shift work and/or strict hours of work may not be a viable option due to the worker's specific circumstances. Therefore, employers need to take into account flexible hours of work and the ability of workers to do shift work.
- 5) Workers may be required to wear a specific uniform. However, some workers, due to their religious beliefs, may not be able to abide by the uniform requirements (e.g. they wear certain head attire which does not allow them to wear the required workplace head attire). There are alternative ways to ensure that the uniform tradition is upheld (i.e. specialized head attire that still meets the key components of the uniform). In addition, if there is little health and safety risk to others, then the degree of risk for the individual may be examined.

### Q-8 What is undue hardship?

Employers must accommodate workers up to the point of undue hardship. The undue hardship threshold is high.

Decisions by courts and tribunals in human rights cases have ruled that undue hardship means **excessive and substantial disruption** or interference with the employer's operation such that they would alter the essential nature of the organization or significantly affect its viability.

Undue hardship does not mean minor inconvenience or interference. Basically, accommodation measures must be taken unless it is impossible to do so without creating undue hardship.

Two major issues have been identified as important in defining undue hardship:

- If the **financial costs** associated with the accommodation would be so high that they would change the essential nature of the organization or threaten its ability to operate. Note, however, that outside sources of funding should be considered.
- If **health and safety** considerations are not met. Public safety and the health and safety of co-workers must be considered. However, when safety standards are developed or applied, employers must accept that some moderate level of risk might be necessary in order to ensure the success of the accommodation.

Other related factors may be considered depending on case law and the particular jurisdiction. It is important to be aware of the specific definition given to undue hardship in the legislation that applies to your workplace and to hold the employer to that definition, rather than allowing additional factors to be considered.

The point of undue hardship will also vary depending on the size of the employer's operation, but the burden must be significant. Subjective belief, speculation or impressions about increased expenses or future costs are not sufficient to prove undue hardship. Evidence must be provided based on objective facts (e.g. financial statements and budgets, scientific data, expert opinion, detailed information about the activity and requested accommodation, etc.).

As well, in determining undue hardship, an important question is "who is the employer". For example, an employer may insist that the department in which the accommodation is required cannot afford the cost of the accommodation. This may be the case, but it is the true employer (i.e., the whole organization) that is responsible for the accommodations and the question is whether it would be an undue hardship on this larger body. Departments in the federal public service often rely on this argument, but the fact is that the Treasury Board is the employer and has substantial resources.

The determination of undue hardship is a fluid and complex area. Refer to the specific legislation that covers your workplace, or speak with your component office or your PSAC regional office, if you need assistance.

### **Q-9 Who is responsible for proving undue hardship?**

Once the worker has shown that they have accommodation needs related to a prohibited ground under human rights legislation (i.e. disability, religion, family status, etc.), the employer must prove that it is unable to accommodate due to undue hardship.

### **Q-10 What are the responsibilities of the employer in accommodating a worker?**

Responsibilities of the employer:

- to proactively "build conceptions of equality into workplace standards"
- to design workplace requirements and standards so that they do not discriminate
- to identify and remove any workplace discrimination and barriers found in its policies, practices, standards and procedure. For example, workplace standards, such as lifting requirements or work schedules that unintentionally discriminate against employees on a protected human rights ground (*i.e.*, disability, gender, religion, etc.) should be modified or eliminated
- to ensure that equitable access is provided to employees and potential employees to enjoy the benefits, opportunities and privileges that other employees do
- to ensure that discrimination is not allowed on the part of both employer and co-workers

- to inform employees and applicants of their right to accommodation and its duty to accommodate policy and procedures
- to ensure all managers and supervisors are aware, understand and abide by their obligations to accommodate
- to be creative and flexible
- to demonstrate a willingness and commitment to accommodate
- to identify the need for medical information, assessment and accommodation if not possible by the worker themselves
- to review, follow-up and assess accommodation of workers on an on-going basis
- to maintain confidentiality and respect privacy and dignity of the workers who are being accommodated
- to respect the collective agreement in terms of accommodation
- to address the issue with the worker and the union
- to consult and seek information concerning their workers' disability-related employment needs from workers, union representatives and medical and accommodation specialists
- to consult and work with the union and the workers to eliminate discrimination and provide education on the duty to accommodate.

As well, employers have related responsibilities that will affect the success of accommodation initiatives, specifically:

- to provide a workplace free from harassment
- to abide by the return to work processes under labour codes, workers' compensation, disability insurance and other related legislation
- for employers falling under federal jurisdiction, to comply with the *Employment Equity Act and Regulations*, which includes the requirement to consult and collaborate with unions in order to achieve equality in the workplace

### **Q-11 What are the responsibilities of the worker being accommodated?**

The worker requiring accommodation has the following responsibilities:

- to identify and communicate the need for accommodation, if possible\*
- to inform the employer of any changes to the accommodation needs
- to collaborate with the employer to find the most appropriate accommodation, if possible. This can be done with the assistance of a union representative.
- to communicate with the employer and with their union representative, if applicable
- to accept reasonable offers of accommodation. Note: the employee is not entitled to insist on their ideal or perfect accommodation; if the employer's proposal is a reasonable accommodation then the employer has met its duty.
- to offer a reasonable explanation for refusal to accept a proposed accommodation

- to supply job-relevant medical information in cases relating to disability (non-diagnostic information only, such as the functional limitations and capabilities, e.g. “the worker can lift between 1 and 25 lb.”)
- to supply other information that may be necessary to demonstrate the need for accommodation (e.g. in cases of family status)

While the worker has a requirement to be cooperative and assist in identifying and implementing an appropriate accommodation, they only need to provide information relevant to the accommodation. There is no legal requirement to reveal a medical diagnosis and, in some cases, the worker may wish to keep the diagnosis private due to current social stigmas around their particular illness or condition. See [Q-15 on Medical Information](#).

\*It is important to note that in some cases, the disability itself can prevent a worker from asking for accommodation. For example, a mental health disability or substance use disorder may lead the employee to deny or not understand that they in fact have a disability. This does not let the employer off the hook. There is a duty of employers, and unions in certain circumstances, to ask questions and offer assistance to the employee if a disability is suspected, or ought to have reasonably been suspected.

### **Q-12 What are the responsibilities of the union as a worker representative?**

The responsibilities of the union representative include the following:

- to insist that the employer fulfills its proactive duty to design workplace requirements and standards so that, from the outset, they do not discriminate
- to model a problem-solving approach to accommodation (be proactive in putting forward possible accommodations – available positions, modifications, etc.)
- to assist and represent a member requiring accommodation throughout the accommodation process
- to collaborate with the member and the employer in accommodating the worker
- to respond to employer accommodation proposals
- to follow-up after the accommodation is implemented to assess whether it is working and to help address any associated issues that may surface
- to ensure that the collective agreement does not discriminate during the collective bargaining process and during the life of the collective agreement
- to inquire with a member who is having difficulty at work or has been disciplined as to whether any accommodations are needed (where a disability or other ground of discrimination appears to be a factor)
- to educate other employees in the workplace about the duty to accommodate, especially if there is a lack of understanding on this issue



As well, the Union may play a role in the following ways:

- providing and ensuring the employer provides education about equity issues and the duty to accommodate
- providing its own educational courses on human rights and the duty to accommodate
- seeking to ensure that the worker's rights (human rights) are respected
- balancing the need of the individual worker for accommodation and the interests of the bargaining unit members as a whole
- complying with the consultation and collaboration provisions under the *Employment Equity Act*
- seeking to ensure the health and safety of co-workers is not compromised and involving health and safety officials as required

### **Q-13 Who else needs to be involved in workplace accommodation?**

Co-workers need to be involved to the point that they understand what the duty to accommodate is and why it is valuable for the whole workplace. It is not helpful if other workers feel that a co-worker is receiving "special treatment". The duty to accommodate must be approached in a problem-solving mode, involving everyone who will be affected, at least through education. It is important to remember that others may not be entitled to know about specific workers' disabilities due to confidentiality and privacy issues.

In some cases, it may be appropriate to involve a union health and safety representative in accommodation cases to ensure that health and safety protocols are being respected (e.g. air quality in ventilation systems, ergonomic assessments, work process or workplace redesign, etc.).

As well, accommodation may involve medical and other professionals to assess the workplace, the job in question or the worker requiring accommodation.

### **Q-14 What would be an ideal process for the accommodation of a worker in the workplace**

#### **Systemic approach**

At the outset, the employer should design all standards, requirements, procedures and policies to ensure that they are not discriminatory. Flexibility and a willingness to accommodate individual needs must be built in to all workplace standards and practices.

When a barrier or discriminatory standard arises or is recognized, the employer should first review the standard against the requirements for a BFOR and make changes, if possible, to eliminate the barrier. If the employer is not able to address the matter with a systemic approach, it may become a situation of accommodating the needs of one or more individual workers.

### **Individual cases of accommodation**

Although each case is different and must be approached with flexibility, there are some basic steps to follow in accommodation cases.

For a specific outline of the steps involved in a typical accommodation process, see Appendix B and H.

A key element to the success of an accommodation is the ongoing involvement of the worker being accommodated, and ideally their union. Especially in cases of disability, there is sometimes a tendency to decide what is best for the worker without their involvement, when, in fact, they know their own situation better than anyone else. It is not helpful for the employer and union to try to accommodate a worker between the two of them. Where decisions are made without the permission or knowledge of a worker, it can result in that worker feeling excluded from a process that will affect them on a daily basis. It might also prevent other members from stepping forward for fear they will begin a process over which they have no control.

Also, accommodations must be made on a case-by-case basis. There is no one-size-fits-all solution and the parties must remain flexible and open to the possibility that the employee's needs will change over time and thus, their accommodation might have to be adapted.

There are no set rules when assessing accommodation measures. However, the objective is to have little or no negative impact (i.e. financial, classification, relocation, etc.) on the worker requiring accommodation. The following is a guideline when considering how and what can be proposed as accommodation measures:

- Can the worker perform their existing job as it is (i.e. same classification, location and wages)?
- If not, can they perform their job with modifications, physical changes or “re-bundled” duties?
- If not, can they perform another job in its existing form (i.e. same classification, location and wages)?
- If not, can they perform another job with modifications, physical changes or “re-bundled” duties? (This may involve re-training)

When assessing accommodation measures, the employer should examine its entire organization. For example, if no accommodation measures are available within the work site/department, then accommodation measures outside of the work site/department should be considered.

## Q-15 What medical information is required during an accommodation process?

In many situations involving disability, the employer may request medical information to assess what suitable accommodation measures are required. In other situations, medical information is unnecessary since the accommodation may be obvious.

In cases where medical information is necessary to support a request for accommodation, medical information that must be provided should only consist of what is necessary to assess accommodation in the workplace, i.e. **limitations and restrictions**. The worker only has to disclose medical information that is relevant to the disability being accommodated and does not have to provide access to their entire medical file. Diagnosis is not required in virtually all cases.

The first source (and the best source) of medical information is the worker's own treating medical practitioner. Where the employer needs medical information in order to accommodate an employee, the employee should submit a medical certificate from their medical practitioner.

An employer may request more information if there is some issue or problem with the medical information (e.g. insufficient information, ambiguities or contradictions in the information provided, or the need for a more specialized assessment). Further clarification should be sought from the worker's medical practitioner. If a specialist is needed, the employee can go to a specialist of their choosing. In some cases, an independent medical exam may be reasonable. An independent medical exam is one where all parties agree on a medical practitioner.

Although in some cases, an independent assessment may be required (e.g. unable to get answers from the worker's medical practitioner), an employer cannot insist or automatically require that a worker go to the employer's own medical assessor (e.g. Health Canada) for a medical assessment, unless there is specific language in the collective agreement. Human rights case law is clear that an employer cannot discipline a worker who refuses to submit to an employer's own medical assessor.

However, a refusal to provide medical information or to go for a medical assessment may result in some negative consequences (e.g. remaining on leave without pay, not being accommodated back into the workplace, termination, etc.), so it may be necessary to comply while filing a grievance.

Some employers have policies that outline the requirement for medical assessment processes (e.g. the Occupational Health Evaluation Standard is applicable to federal public service workers under Treasury Board). However, these policies should be consistent with the requirements under human rights and privacy legislation and case law.

At any time during the accommodation process, a union representative can be contacted for assistance.

## **Q-16 Can I file a grievance if accommodation is not provided? What other recourses are there?**

For many members, a grievance is a possibility and may be based on specific or general “No Discrimination” language in the collective agreement.

Sample grievance wording:

I grieve that the employer has failed to accommodate me in the workplace and therefore has discriminated against me on the basis of \_\_\_\_\_ (*applicable ground such as disability, family status, etc.*), *contrary to Article \_\_\_ No Discrimination, \_\_\_\_\_ (other relevant articles of the collective agreement) and contrary to the \_\_\_\_\_ (Canadian Human Rights Act or applicable provincial/territorial human rights legislation).*

Remedy requested: For the employer to provide me with the needed accommodation immediately, in accordance with \_\_\_\_\_ (“my physician’s recommendations” or other relevant information of the grievor), and full redress for any losses, including \_\_\_\_\_ (*e.g. reimbursement for lost salary and benefits, restoration of sick leave credits, etc.*), pain and suffering, and any other appropriate remedy in order to make me whole.

At the same time, while the workers’ rights are protected by filing a grievance, it is often productive to enter into a problem-solving mode with the employer and the union on a “without prejudice” basis. The union should initiate discussions with the employer through this more informal route, if possible.

Note that there are time limits to file grievances. Although accommodation issues are often ongoing, grievances generally need to be filed within the time period defined by the collective agreement. If they are not filed in time, there is no guarantee that the grievance will be accepted by the employer. Also, an untimely grievance could limit the scope of time covered in the grievance and the scope of any remedy.

If you are in doubt about whether there is a valid human rights grievance, then you should still file it to protect time limits and ensure that you cover appropriate remedies (i.e. “at least make whole”, “pain and suffering”, etc.). Keep in mind, “if you feel it, file it”. You may also want to speak to your component or PSAC regional office.

It is often beneficial to file both grievances and human rights complaints at the same time. A human rights complaint is to the human rights commission under the human rights legislation that covers your workplace, on the basis of discrimination on a prohibited ground. There are also time limits to file human rights complaints, so you should contact the human rights commission at the same time you are filing your grievance, in order to ensure that you meet both time limits.

Complaints may also be made under workers’ compensation legislation. If a formal process is required to encourage the employer to reasonably accommodate a worker, contact your component office or PSAC regional office for assistance in determining the best route.

**Q-17 What is the “dignity of risk”?**

The dignity of risk refers to the right of an individual to assume a higher risk to themselves than might normally be considered acceptable in a workplace. Where possible, the individual should be allowed to assume risk with dignity, subject to the undue hardship standard.

The risk created by modifying or waiving the health and safety requirement must be weighed against the right to equality of the individual. For example, a person may decide not to wear a hard hat due to individual religious requirements. The higher risk is to that specific individual and not others.

This concept applies only if it does not cause serious safety risks to co-workers or the general public. If there is a risk to public safety, then consideration should be given to the increased numbers of people possibly affected and the likelihood that a harmful incident may happen.

Types of risk legally tolerated at the workplace or within society as a whole will be considered. In some cases, higher risk might result in increased liability for the employer and higher costs. In these cases, the ability to assume risk would be limited.

**Q-18 In what way does the duty to accommodate apply to PSAC members receiving disability insurance benefits?**

The incidence of disability insurance claims has increased significantly, and most of these claimants will eventually return to the workplace in some capacity. The majority of disability

insurance policies that apply to PSAC members contain contractual provisions for rehabilitation assistance. However, the basic principles of the duty to accommodate, as discussed in this publication, certainly apply in these types of situations and can facilitate a successful reintegration back into the workplace.

**Q-19 What are the steps a member can take to return to work after being away from the workplace for a prolonged period of time while receiving disability benefits?**

When an employee has been away while receiving disability benefits, PSAC recommends a gradual return to work. You should work with your local representative, attending physician and the insurer (e.g. Sunlife or Industrial Alliance) to develop an appropriate graduated return to work plan. For example, if the employee worked five days per week, a graduated work plan could have the employee return to work three days per week while the insurer will pay for the remaining two days. This work plan must be agreed to by all parties involved (employee, employer, attending physician and insurer).

## **Q-20** What do I need to know about return to work programs?

Return to work programs are **meant to facilitate an injured or ill worker's return** to their pre-leave employment, with an appropriate transition period, when the worker is ready to return to work.

The **goal of a return to work** process should be to ensure that tasks and duties assigned to the worker are meaningful and productive and have value for the worker and employer. The return to work should have a rehabilitative focus.

If pre-leave employment is not an option, then a hierarchy of return to work options should be respected: (1) same job; (2) modified job; (3) different job-same workplace; (4) similar job-different workplace; (5) different job-different workplace.

The objective is to minimize hardship (financial and emotional), as well as respecting the dignity of the person (performing meaningful work).

Return to work programs should be seen as **transitional** and for a fixed duration. Permanent measures to support a worker who has a permanent disability are best framed as accommodation measures, as opposed to return to work measures.

Most organizations that have benefit plans also have some form of disability insurance with a focus on rehabilitation.

### **Why do these programs exist?**

Many workers' compensation laws include return to work obligations for injured workers and the requirement for the employer to protect the worker's job for a specific time period. Disability insurance plans may also have return to work programs as part of those policies. In the federal public service, specific departmental responsibilities on return to work exist under the Occupational Health Evaluation Standard.

### **Who is covered?**

The return to work program should include employees with **permanent disabilities as well as temporary disabilities**. The program should apply to all workers with disabilities, regardless of whether the illness or injury is work-related.

Disability insurance applies to workers who have completed six months of employment.

Qualifying conditions exist for workers' compensation cases.

## When does a return to work situation arise?

Typically, return to work situation arise from:

- the return of a worker who has been receiving workers' compensation;
- the return of a worker who has been on disability insurance;
- the return of someone who has been injured or who has developed a disability, but who has not qualified for income replacement programs (worker's compensation or disability insurance); or
- other long term leave situations.

## How does it work?

Return to work programs should **lay out the steps** that need to be taken to support the returning worker.

Return to work discussions should identify and eliminate any **root causes of the absence** from the workplace, where applicable. Return to work programs should not create a revolving door response to unsafe working conditions.

**Individual assessments** are key to return to work programs. These programs should not be seen as one-size-fits-all measures but should respond to the needs of the individual's situation. In addition, work-related and non-work-related disabilities should be treated in a similar manner.

**Job task analysis** ensures that the job duties and tasks are assessed (using job-related criteria) and compared with the functional limitations of the returning worker. Typically, job task analysis will assess physical requirements of job duties (such as tools used, postures required, endurance) and will involve observing workers performing job duties. In cases of mental health disabilities, factors such as communication, exposure to conflict, and the nature of their contacts with others would also need to be assessed. The returning worker should be an active participant in the job analysis and evaluation, along with a local health and safety representative.

**Timeframes** spelled out in the return to work plan should not be arbitrary but should respect the needs of the returning worker. Having timeframes associated to key activities ensures accountability for their implementation.

**Medical assessments** should be completed by the medical practitioner who is best placed to understand the medical condition of the returning worker - their treating physician. Physicians may be able to provide a diagnosis and treatment, but not be able to provide a functional analysis. Additional expertise, such as an occupational therapist, may be required.

There is an **increased focus on medical assessments** in cases of return to work of workers with disabilities and it is important to understand the difference between a medical prognosis and a functional limitation.

Return to work programs must not lead to a watering down of **collective agreement rights**.

The program should be consistent with the collective agreement. For example:

- layoff and recall provisions for the injured worker should be the same as if they were not injured;
- wages of the injured employee should be the same as if they had not been injured.

**Confidentiality rights** of returning workers should be protected. Information sought should directly relate to the return to work program and only be used for this purpose. Workers' compensation or other income replacement programs may require signing a release of information form. The returning worker is not required to disclose a medical diagnosis (unless they choose to do so). However, information about functional limitations needs to be clear.

Return to Work Programs are likely to **touch on issues** that the union is trying to pursue elsewhere. Union representatives should be drawing a link with work or discussions at other important tables such as joint health and safety committees, employment equity committees, or duty to accommodate committees.

**Early assistance** can make a difference in the successful re-integration of a returning worker. As an example, studies show there is only a 50% chance that a worker will return after a six-month absence. At the same time, returning too early may jeopardize the rehabilitation of the returning worker or worsen the medical condition.

**Recourse** rights in return to work situations can be exercised via:

- Disability insurance appeals
- Workers compensation appeals tribunals
- Grievances (depending on the language in your collective agreement)
- Human rights complaints

The support of co-workers is critical to a successful return to work situation, particularly when the situation involves job tasks modifications or job re-bundling.

### **Q-21 How does accommodation relate to health and safety in the workplace?**

In providing accommodation to an individual, the employer should not create any additional hazards to that individual or to other workers.

However, the employer must accommodate to the point of undue hardship. Inconvenience to the employer and other employees does not, in itself, constitute undue hardship.

If the disability resulted from a workplace injury or illness, the worker must report the incident or near miss to the employer and may need to access worker's compensation. If the employer agrees that a danger exists, the employer should take immediate action to protect employees from danger. As well, the employer must notify the workplace health and safety committee, so they can take steps to ensure that the hazard is eliminated and does not injure other workers.

If you need assistance, consult your component or regional health and safety representative.



**Q-22 When an accommodation case relates to a workplace injury or exposure, what can my employer know about my underlying medical condition(s) and how can I prevent other people from needing accommodation from injury or exposure to the same hazard?**

Under no circumstance does the employer have any right to know your underlying medical condition. The employer can only know what you can do and what you cannot do (e.g. limitations and restrictions). If you think there is an underlying health and safety issue, then address it separately from your accommodation. Speak to your local health and safety representative, or local union representative.

**Q-23 What other resources are available to assist me in understanding the duty to accommodate?**

- Aside from this booklet, you may contact your component office or PSAC regional office for further information.
- You should examine the relevant legislation and your collective agreement.
- Ask your employer for a copy of their accommodation policy(ies).
- Ask your employer for a copy of their employment equity policy (if applicable). Employers subject to the *Employment Equity Act* should have consulted and collaborated with union representatives on the development and the implementation of such a policy.
- PSAC offers basic and advanced courses on the duty to accommodate. Check with your regional office to find out about courses offered or visit [psacunion.ca/education](http://psacunion.ca/education).
- The Joint Learning Program, which covers workers in the federal public service, offers a work shop on the duty to accommodate.

If you would like to see any material added to or clarified within this booklet, please contact the Human Rights Office to give us your feedback.

For more information please contact:

PSAC Human Rights Office  
Programs Section, Membership Programs Branch

Public Service Alliance of Canada  
233 Gilmour Street  
Ottawa, Ontario  
K2P 0P1

1 888 604 7722

[psacunion.ca/contact-us](http://psacunion.ca/contact-us)

## **APPENDIX A**

### **ACCOMMODATION: CAUTIONARY TIPS**

- ✓ The duty to accommodate is owed to both current employees and job applicants.
- ✓ There are no hierarchies of different forms of accommodation. Therefore, family, religious, disability and other forms of accommodation should each be assessed on a case-by-case basis.
- ✓ Initial accommodation analysis should focus on the employee's current job. Accommodation is not about avoiding barriers (by transferring an employee to another job) it's about dealing with barriers!
- ✓ Accommodation obligations do not give additional rights to the employer with respect to employee information and employee privacy.
- ✓ Accommodation must be achieved in a way that most respects the dignity of the worker who requires accommodation. Dignity is best respected when the worker participates in the accommodation process and its outcomes.
- ✓ Accommodation of an individual may not be "obvious", but the employee, union and employer have to be open, diligent and creative to find possible accommodations.
- ✓ Do not make assumptions about the ground for accommodation (e.g. religion, family, disability, etc.). In particular, assumptions that a non-visible disability does not require meaningful accommodation can lead to inadequate accommodation.
- ✓ There is no requirement to provide a diagnosis of a disability.
- ✓ Medical practitioners have expertise in diagnosis and in treatment. They do not automatically have expertise on workplace assessments or assessments of functional limitations.
- ✓ In cases of mental health disabilities or substance use disorders, where an issue in the workplace arises but the worker denies they have a disability, there is a higher onus on the employer and the union. Employers and unions are expected to take some steps to inquire about the possibility of a mental health disability to meet their accommodation obligations. Claiming that one "did not know about the disability" in these types of situations does not relieve employers or unions of their responsibilities. However, once the issue has been raised, workers in these circumstances do have a responsibility to seek or accept help to assist the accommodation process.

- ✓ Religious accommodation must allow individuals who have sincere religious beliefs to have their religious needs accommodated. Universally recognized lists of “accepted” religions don’t exist. The entitlement to religious observance is not limited to the dominant group (e.g. Christmas and Good Friday). A case-by-case assessment is important to ensure that religious beliefs and values are accommodated to the point of undue hardship. Religious accommodation may include prayer breaks, accommodation of religious dress, or leave entitlement for religious observance.
- ✓ Unions can be held liable for discriminatory collective agreement provisions and for blocking employer accommodation attempts.

## **APPENDIX B**

### **Steps in the accommodation process**

#### **1. Need for accommodation arises**

- ✓ Employee approaches management or union about accommodation need or a pending return to work, or union representative recognizes that accommodation may be needed and discusses with worker
- ✓ Formal and clear request for accommodation is made to the employer (if not done already)
- ✓ If an employee approaches management about accommodation without the involvement of the union, the employer should advise the employee of their right to have a union representative involved. Both the employer and the union must respect the employee's right to privacy.

#### **2. Information gathering**

- ✓ Employee must provide information relevant to the accommodation
- ✓ In disability cases: provide information from their treating physician(s) that outlines the accommodation needs and any limitations or restrictions. Diagnosis is not required, but the information must be detailed enough to establish what the needs/limitations are and that they are related to a medical condition. See sample letter to physician.
- ✓ If the disability results from a workplace injury, there are specific processes that need to be followed under workers' compensation legislation. Contact the workers' compensation office in your jurisdiction or speak to a PSAC regional representative for assistance.
- ✓ If it is a return to work after a lengthy absence, refer to Q20 on return to work programs
- ✓ In some disability-related cases, a special assessment may be needed such as a visit to a specialist, an ergonomic assessment, etc. Wherever possible, the parties should agree on who performs the assessment. The employer cannot force the employee to see the "company doctor", including Health Canada (if the employer insists, the employee may need to "obey now and grieve later" – speak to a regional or component representative in these cases).
- ✓ In other cases (religion, family status, etc), the information needed will vary but the employee will have to provide some information about the need for accommodation and how it is linked to the human rights ground. Check any related collective agreement provisions that may assist the accommodation (e.g. flexible work hours, leaves of absence, etc.)

### **3. Meeting of the parties to discuss possible accommodations**

- ✓ Ideally, the employee, union representative, their manager/supervisor and a human resources person should meet to discuss the needs and possible accommodations. Depending on the case, this may be one or several meetings.
- ✓ Both the union and employer should examine the workplace and come to the meeting with possible solutions.
- ✓ Document and take notes of all meetings.

### **4. Implementation of accommodation**

- ✓ Accommodation agreement should be in writing (e.g. a return to work agreement, accommodation plan)
- ✓ The written accommodation plan should include the specific accommodations made, the parties' commitments and obligations, and a timeline.
- ✓ In some cases, co-workers may need to be notified if the accommodation will impact others in the workplace. This should be done with sensitivity and respecting the employee's right to privacy as much as possible.

### **5. Follow-up and re-assessment of accommodation needs**

- ✓ In most cases, there should be a follow-up after some agreed-upon period of time to ensure that the accommodation is working and to determine if there have been any changes in circumstances that require a re-assessment and/or change to the accommodation.
- ✓ The union rep should also periodically check in with the worker to make sure the employer is implementing the accommodation as agreed.

## **APPENDIX C**

### **Accommodation on the basis of disability: Checklist for union representatives**

Is there a disability?

- Medical information may be required
- If the member is unable to obtain the medical information themselves and clarification is needed then obtain a voluntary release for medical information that relates to the accommodation needs only (not a release of all medical information or medical information that does not relate to the disability that requires accommodation)

What is the extent of the disability?

- Job demands analysis and work description to be provided to the physician or other experts
- Medical information concerning the nature and extent of restrictions and limitations
- Ensure medical information links restrictions and limitations to the accommodation of required/requested
- Follow-up if medical information is inadequate or inaccurate

Can the employee's own job be modified short of undue hardship?

- Work and workplace redesign and re-bundling of tasks
- Use of equipment, assistive devices
- Alternative or flexible schedules and hours
- Reassignment and other available jobs
- Temporary rehabilitative assignments

Has a thorough review of other "available" positions or modified duties been conducted?

- Inside the section, branch, department
- Inside the whole organization
- There should be an extensive examination of the workplace to see if there are possible accommodations with the least economic and emotional impact on the individual.

Has the cooperation of the employee been secured?

- Information about the extent of restrictions and the nature of accommodation needed
- Job modification suggestions
- Written consent to release medical information (relevant for the accommodation)

Has the union been involved?

- Union representative is proactive in putting forward possible accommodations
- Assessment of the collective agreement rights
- Consideration of impact on rights of others and on collective agreement
- Consideration of confidentiality and privacy rights

Does the accommodation allow the worker to retain their dignity?

- If not, are there other methods of accommodation available, which would better promote dignity without imposing undue hardship?

Is there a process for ongoing review of the effectiveness of the accommodation?

- any changes in circumstances which would impact the availability of accommodation
- regular and consistent monitoring
- input from employee, employer, medical professionals and union

Is there documentation of each stage of the process?

- Personnel records (i.e. absenteeism record)
- Information from the employee
- Medical information
- Notes of interviews and telephone calls
- Record of accommodation discussions with the union, employee and employer
- Record of alternative or modified duties and positions available
- Record of modified duties, alternatives considered and scope of modifications
- Record of all costs, safety risks with alternatives
- Record of why accommodation and alternatives were accepted or rejected

## **APPENDIX D**

### **Mental health issues: Dos and don'ts for assisting members**

#### **Do:**

- sensitize union members about mental health disabilities
- ensure we have harassment-free workplaces
- listen carefully and respectfully
- recognize signs of mental health disabilities so that we can assist our members and direct them to appropriate resources
- find out what assistance and recourse routes are available in the workplace and community for members with mental health disabilities
- be sure that members know their rights
- find out if the member is competent and well enough to act – and if not, work with a health practitioner to get them there and ensure they are protected in the workplace
- help members to navigate the various systems and recourse avenues, including their obligations in this regard (i.e. medical certificates etc.)
- use union expertise to create accommodation plans that work
- seek time extensions where necessary for the member
- help the member accept the need for accommodation
- minimize conflict and stress for the member, however possible
- respect the confidentiality of the member, however possible (unless they are a danger to themselves or to others)
- be flexible
- assume the member knows what is best for them
- always respect the dignity of the member
- document every interaction with the member and the employer
- get assistance when we need it

#### **Don't**

- assume we know what is best for the member
- divulge information that is confidential
- label or stereotype members with mental health disabilities
- act like a counsellor / therapist or give advice on how to address the mental health issues in the workplace
- impose solutions or resolutions on the member
- look for quick fixes
- be inflexible
- talk down to the member
- tolerate “mobbing” or discrimination
- allow opportunities for sensitization to pass us by
- stop assisting the member because they are “difficult” or “uncooperative”



## APPENDIX E

### Sample release of information form

I authorize my treating medical practitioner to provide the following information to the Human Resource person responsible for my file information:

- verification that I am experiencing an injury or medical condition that currently prevents me from performing some or all of the duties of my job
- whether returning to work is possible, and if so when can I return to work
- what, if any, accommodations should be made to my job duties or in the workplace to enable me to safely return to work

*To be clear, you are not required to provide a diagnosis; the release of any medical information is limited to answering the attached medical questionnaire, as well as clarifying the provided answers.*

I understand that I will be provided with a copy of this information.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date

## **APPENDIX F**

### **Sample medical ability to work form**

*The purpose of this form is to provide the patient with the necessary information that they need to give to their employer to help the employer make decisions about accommodating the patient, providing disability leave, or assessing if the patient can return to work.*

*When completing this form, disclose only information necessary to meet the purpose of the form. Typically, it is not necessary to provide a diagnosis or treatment information.*

**Physician's name and address:**

\_\_\_\_\_

I saw \_\_\_\_\_ (patient's name) on \_\_\_\_\_ (date)

Date of injury or illness, if applicable \_\_\_\_\_

This patient is medically able to work with limitations or restrictions as of  
\_\_\_\_\_ (date).

**Restrictions or limitations (see Sections A and B for details)**

In my opinion, the restrictions or limitations indicated in Section A are:

- |                                     |  |  |
|-------------------------------------|--|--|
| <input type="checkbox"/> Temporary: | <input type="checkbox"/> _____ days        | <input type="checkbox"/> 4 to 6 weeks        |
|                                     | <input type="checkbox"/> less than 2 weeks | <input type="checkbox"/> 6 weeks to 3 months |
|                                     | <input type="checkbox"/> 2 to 4 weeks      | <input type="checkbox"/> more than 3 months  |

Permanent: Date of next appointment \_\_\_\_\_

My opinion is based on the factors indicated below:

- Information provided by the patient
- My examination of the patient and my assessment of the findings and health information

I have provided this form to the patient named above

\_\_\_\_\_  
Physician's signature

\_\_\_\_\_  
Date

**SECTION A:**

<b>PHYSICAL</b>	<b>Restriction</b>	<b>Limitation</b>	<b>MENTAL</b>	<b>Restriction</b>	<b>Limitation</b>
sitting			Thinking/ reasoning		
standing			concentration		
walking			memory		
lifting			critical decision- making		
carrying			interpersonal contact		
Pushing/ pulling			alertnes		
climbing stairs			other (specify in section b)		
climbing ladders			<b>ENVIRONMENTAL</b>		
climbing scaffolding			exposure to heat/cold		
crouching			exposure to dust/fumes/odor		
crawling			exposure to chemicals		
Kneeling			food handling		
Bending/ Twisting/ Turning			other (specify in section b)		
repetitive activity			<b>OTHER</b>		
sustained postures			shift/attendance duration		
gripping			consecutive shift attendance		
reaching			shift work		
Fine dexterity			overtime		
balance			operating vehicle		

Vision/ hearing/ speech			operating equipment		
other (specify in section b)			working heights		
			other (specify in section b)		

**Specific Functional Restrictions and/or Limitations**

Patient's name \_\_\_\_\_

Does the patient require medical aids (e.g. splint, brace) or personal protective equipment (e.g. gloves, mask)?

- No       Yes (specify in section B)

**SECTION B:**

Please provide necessary details about any restrictions or limitations you have identified. It is not necessary to provide a diagnosis or treatment information.

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I have provided this form to the patient named above.

\_\_\_\_\_  
Physician's signature

\_\_\_\_\_  
date

## APPENDIX G

### Important Cases dealing with accommodation

ISSUE	CASE NAME	SUMMARY
Employers must be proactive when designing standards	Meiorin (1999) <a href="#"><u><i>(British Columbia (PSERC) v. British Columbia Government and Services Employees' Union)</i></u></a>	<p>Supreme Court of Canada imposes positive obligation on employers to accommodate workers. In this specific case, a female fire fighter was found to be discriminated against when the employer instituted a standardized fitness test that did not adequately take into account the differences between men and women.</p> <p>Note: also radically changes specific points of accommodation law set out in earlier cases, e.g. accommodation to the point of undue hardship must be made before a BFOR can be established.</p>
Reaffirms Meiorin	Grismer (1999) <a href="#"><u><i>(Grismer v. British Columbia (A.G.))</i></u></a>	Supreme Court of Canada reaffirms its decision in <b>Meiorin</b> applying it to a disability case. Emphasizes that individualized versus standardized testing must be used.
<b>Post-Meiorin cases</b>		
Human rights duty to accommodate trumps other laws on return to work	<a href="#"><u><i>Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron, 2018 SCC 3</i></u></a>	The Supreme Court of Canada affirmed that the duty to accommodate in employment is a separate (and paramount) consideration from any other specific legislative requirement that addresses an employee's ability to return to work.
Mental health, duty to accommodate may include transferring employee to another workplace	<a href="#"><u><i>Emond v. Treasury Board (Parole Board of Canada), 2016 PSLREB 4</i></u></a>	A Public Service Labour Relations and Employment Board adjudicator ruled that the Parole Board of Canada failed in its duty to accommodate one of its employees by refusing her request to work in a different building after she developed mental health problems triggered by a threatening and disruptive colleague. The Board ordered that the employee be moved to a different building and compensated for lost wages and benefits.

<p>Forced retirement, employer must look in other departments</p>	<p><a href="#"><u>Nicol v. Treasury Board (Service Canada (2014 PSLREB 3)</u></a></p>	<p>The worker had been off on disability leave for an extended period. When he was ready to return to work, he provided all the necessary information about his medical conditions and accommodation needs, but Service Canada never provided him with a suitable job offer. After years of fighting for accommodation, he was forced to take medical retirement.</p> <p>The Board found that Service Canada failed to meet its legal duty to accommodate. The Board stated that the employer was trying “to force the grievor to accept a demotion without proper accommodation or to quit” and that he was ultimately “cornered[...] into applying for medical retirement as the only way he could see to obtain some income”.</p> <p>Service Canada had an obligation to look for suitable jobs in other departments within the public service, but failed to do so.</p>
<p>Family status (child care)</p>	<p><a href="#"><u>Johnstone (2014) (Canada (Attorney General) v. Johnstone, 2014 FCA 110)</u></a></p>	<p>Federal Court of Appeal upheld the decision of the Canadian Human Rights Tribunal. The decision found the Canada Border Services Agency (CBSA) discriminated against Fiona Johnstone by failing to accommodate her family obligations. The Court confirmed that human rights legislation is to be interpreted in a broad and liberal manner and that family status includes child care and other legal family obligations.</p>
<p>Family status (Eldercare)</p>	<p><a href="#"><u>Hicks (Hicks v. Human Resources and Skills Development Canada, 2013 CHRT 20)</u></a></p>	<p>Worker was asked to relocate to Ottawa in another public service job; his wife stayed behind to care for her ailing mother. Her mother depended on her both physically and emotionally and was not well enough to travel to Ottawa. Mr. Hicks applied for an expense claim under the federal government’s relocation directive and was denied.</p> <p>The Tribunal found that the HRSDC had discriminated against Mr. Hicks based on the ground of family status, stating that eldercare should be recognized the same way child care is.</p>

<p>Mental health, duty to inquire</p>	<p><i>Mackenzie v. Jace Holdings and another (No. 4), 2012 BCHRT 376</i></p>	<p>The B.C. Human Rights Tribunal held that an employer should have inquired about an employee's behaviour following a stress leave rather than dismissing her. There were sufficient signs from the employee to cause the employer to make inquiries into whether accommodation was needed.</p>
<p>Accommodation of environmental sensitivities</p>	<p><a href="#"><u><i>Cyr v. Treasury Board (Department of Human Resources and Skills Development) 2011 PSLRB 35</i></u></a></p>	<p>The grievor filed a grievance against the employer for making it difficult to obtain the accommodation to which she was entitled. The grievor suffered from environmental hypersensitivity, and telework was the accommodation recommended by the physician. The adjudicator found that the employer failed in its duty to accommodate by trying to change the grievor's work arrangement without consulting her and by failing to provide the required work tools in a timely fashion.</p>
<p>Religion</p>	<p><a href="#"><u><i>Qureshi v. G4S Security Services, 2009 HRTO 409</i></u></a></p>	<p>The Ontario Human Rights Tribunal ruled that a new applicant who needed one hour off work to pray was not properly accommodated. In awarding both monetary damages as well as orders to develop a policy and training program, the Vice-chair was particularly critical of the failure to engage any accommodation process.</p>
<p>Duty to accommodate is employer-wide</p>	<p><a href="#"><u><i>O'Leary v. Treasury Board (Dept. of Indian Affairs and Northern Development) 2007 PSLRB 10</i></u></a></p>	<p>A grievor was found to be unfit to return to work in an isolated post after developing a disability. The employer did not offer any position other than at the isolated post. As a result the grievor was unemployed for most of the time since filing the grievance. The arbitrator found that the obligation to accommodate an employee due to a medical condition was employer-wide and not limited to a region or a department.</p>

<p>Duty to inquire, term contract</p>	<p><a href="#"><u>Mellon v. Human Resources Development Canada, 2006 CHRT 3</u></a></p>	<p>An employee who did not disclose her mental health disability to the employer experienced panic and anxiety attacks in the workplace over a four-month period and thereafter the employer did not renew her contract. Earlier she had taken a sick leave because of emotional stress related to work. After reviewing the circumstances, the adjudicator ruled that the employer should have known that the worker was experiencing anxiety and had a duty to accommodate even though she didn't tell them.</p>
<p>Absenteeism</p>	<p><a href="#"><u>Desormeaux v. Ottawa (City), 2005 FCA 311</u></a></p>	<p>The Court of Appeal upheld the CHRC's finding that the employer would not suffer undue hardship by continuing to employ the worker despite her disability and resulting absenteeism, because there were other jobs she could do that would lessen the impact of her absenteeism</p>
<p>Human rights law is part of collective agreement</p>	<p><a href="#"><u>Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, [2003] 2 SCR 157, 2003 SCC 42</u></a></p>	<p>This decision has the effect of automatically incorporating human rights legislation into every collective agreement between unions and employers. Even if a collective agreement does not expressly prevent the parties from violating a particular statutory right (i.e. human rights), such a violation will amount to a violation of the collective agreement. Human rights and other employment-related statutes establish a floor or a minimum which an employer and union cannot contract out of or beneath.</p>
<p>Employment tests</p>	<p><a href="#"><u>Canada (Attorney General) v. Green, [2000] 4 FC 629, 2000 CanLII 17146 (FC)</u></a></p>	<p>Employers should ensure any employment tests used properly assess skills being tested and that accommodations for testing be put in place. Accommodation for training must be put in place as well.</p>
<p>Medical exam by employer's chosen doctor</p>	<p><a href="#"><u>Canada (Attorney General) v. Grover 2007 FC 28</u></a></p>	<p>The federal court upheld the adjudicator's decision, ruling that "the employer cannot order an employee to submit to a medical examination by a doctor chosen by the employer unless there is some express contractual obligation or statutory authority." (This decision was subsequently upheld by the Federal Court of Appeal.)</p>



Religion	<a href="#"><u>407 ETR Concession Company v. CAW-Canada, 2007 CanLII 1857 (ON LA)</u></a>	<p>An Ontario arbitrator reinstated three grievors after they were discharged for refusing to use a biometric scanning system due to their religious beliefs, ruling that the Company could have gone further in accommodating the grievors.</p>
Independent medical	<a href="#"><u>Marois and Hubert v. Treasury Board (Correctional Service of Canada) 2004 PSSRB 150</u></a>	<p>While this decision does not deal specifically with the duty to accommodate, it does deal with the issue of medical information, in this case in support of a maternity-related re-assignment. In this decision, the Public Service Staff Relations Board ruled that Health Canada physicians are not independent from the employer (the Government of Canada) and as such a Health Canada medical report does not constitute an “independent medical opinion”.</p>
Union’s duty	<a href="#"><u>Bingley (Re), 2004 CIRB 291</u></a>	<p>The Canadian Industrial Relations Board has held that the union had not adequately represented an employee in a duty to accommodate case. In duty to accommodate cases, the Board expects a higher standard of representation from the union.</p>

## APPENDIX H: Disability accommodation process



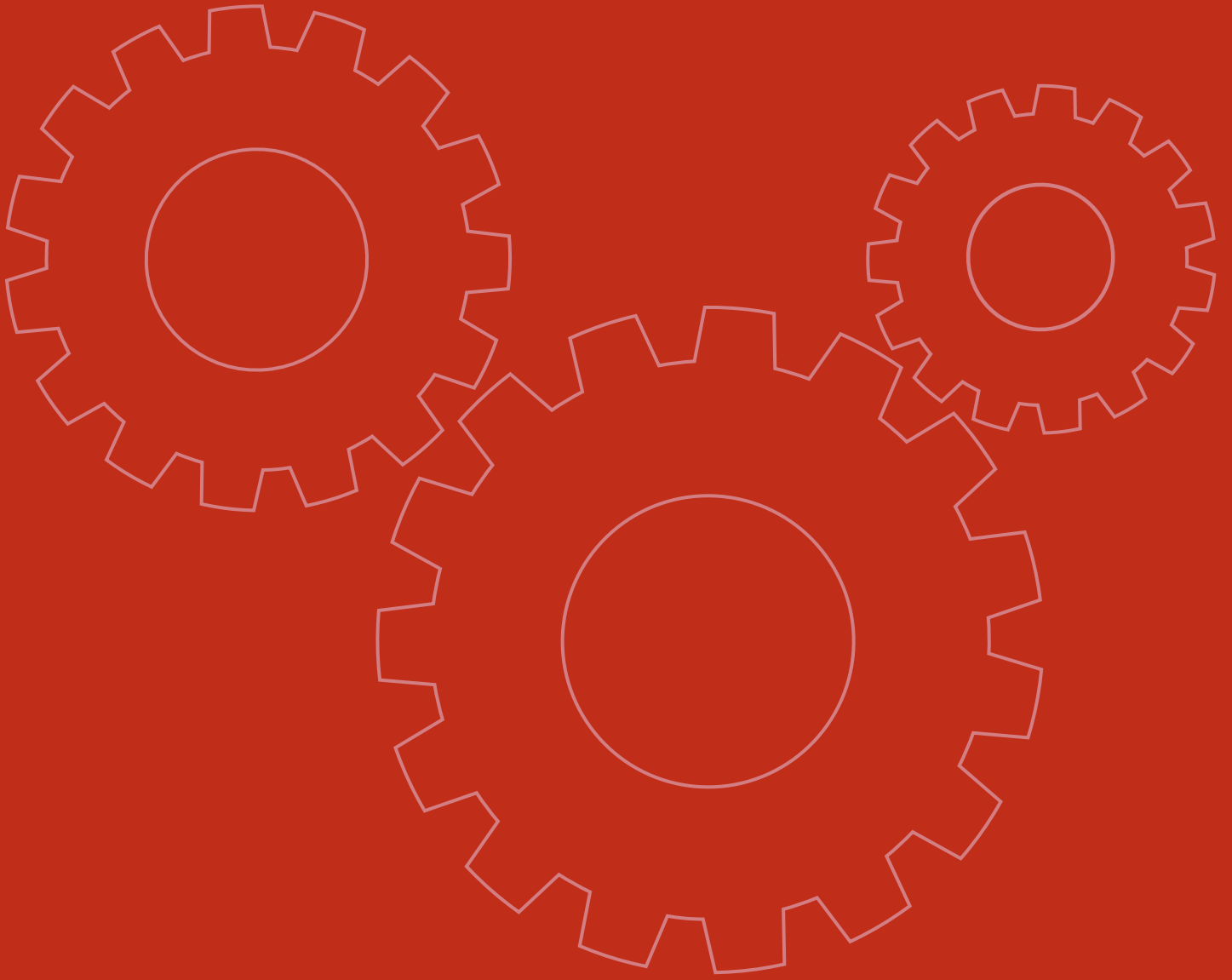












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